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NO.

in the
Supreme Court
of the
United States

October Term, 1983

DEIL OTTO GUSTAFSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Petitioner's Due Process rights are violated when prejudicial "other crimes" evidence is improperly admitted, over objection, and the trial court fails to determine its admissibility under Rules 404(b) and 403, Federal Rules of Evidence.

2. Whether the Constitution requires the judicial adoption of limitations upon a judge's discretion in refusing to rule in advance of testimony whether a defense witness may be cross-examined about matters to which he intends to assert his valid Fifth Amendment privilege, when failure to rule deprives Petitioner of a critical witness in his defense?

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your Petitioner, DEIL OTTO GUSTAFSON, prays that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit to review its decision entered on the 29th day of February, 1984, affirming his conviction.

OPINIONS BELOW

The Judgment and Commitment Order, dated May 4, 1983, is attached hereto as Appendix A. The Opinion of the United States Court of Appeals for the Eighth Circuit affirming Petitioner's conviction is reported at 728 F.2d 1078 (8th Cir. 1984). A copy of this Opinion is also attached hereto as Appendix B.

JURISDICTION

The Opinion of the Court of Appeals for the Eighth Circuit affirming Petitioner's conviction was entered on February 29, 1984. A timely petition for rehearing was denied on March 30, 1984 (a copy of which is attached hereto as Appendix C); and this petition for writ of certiorari is filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to

be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rules of Evidence:

Rule 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404 Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 608 Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

STATEMENT OF THE CASE

Nature of the Case and its Disposition

On November 5, 1981, a 31-count indictment was returned in the United States District Court for the District of Minnesota, charging the Petitioner, Deil Otto Gustafson, and five others[1] with various offenses relating to an alleged check-floating scheme.[2] Defendant Newstrum pleaded guilty two months before the commencement of trial, pursuant to a plea agreement providing for his testimony on behalf of the government. Trial began before a jury on January 3, 1983. At the close of the government's case, two of the defendants, Norris and Bacigalupo, were acquitted by the court, pursuant to Rule 29, Federal Rules of Criminal Procedure. The jury returned its verdicts as to the remaining three defendants on January 23, 1983. This Petitioner, Deil Otto Gustafson, was convicted on all counts; and, on May 3, 1983 was sentenced to imprisonment for ten years and fined $81,000, plus the costs of prosecution.

A timely appeal from this conviction was taken to the United States Court of Appeals for the Eighth Circuit. On February 29, 1984 the Eighth Circuit issued its Opinion affirming Mr. Gustafson's conviction (App. B). A timely petition for rehearing was filed; which, on March 30, 1984, the Eighth Circuit denied. (App. C) This Petition for Writ of Certiorari follows.

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[1]Also charged were Joseph V. Agosto, Roger E. Newstrum, Ralph E. Bruins, James Bacigalupo, and Joan L. Norris.

[2]The indictment charged Petitioner with six counts of mail fraud (18 U.S.C. §1341), five counts of wire fraud (18 U.S.C. §1343), twelve counts of misapplication of bank funds (18 U.S.C. §656), and one count of conspiracy (18 U.S.C. §371).

Statement of the Facts

Mr. Gustafson was, for all practical purposes, the owner of the Summit National Bank of St. Paul (hereinafter referred to as "Summit Bank St. Paul"), Summit State Bank of Richfield (hereinafter referred to as "Summit Bank Richfield"), and the Summit State Banks of Phelan Park and Bloomington during the time period set forth in the indictment. Although these banks were under the same ownership, each was operated by its own Board of Directors and Chief Executive Officer. Operations at these banks were, to different degrees, the subject of the events underlying the indictment in this case.

During the times alleged in the indictment, both the Tropicana Hotel and Country Club (hereinafter referred to as "Tropicana") and a corporation—Production and Leasing, Ltd. (hereinafter referred to as "P&L")—which presented the theatre show at the Tropicana, were among the many business entities utilizing Summit Bank St. Paul as a depositary for its employees' federal withholding taxes. P&L also maintained commercial accounts at Summit Bank St. Paul and Summit Bank Richfield. During this time, Mr. Gustafson—a man of numerous business interests—owned a 20% interest in the Tropicana. P&L was solely owned and operated by Joseph V. Agosto.

In the years of 1976, 1977, and 1978, the Tropicana experienced repeated cash flow problems. As a result, it was not always prompt in meeting its various accounts payable, among which were weekly payments of $60,000 to P&L and its deposits of the Tropicana employees' withholding taxes. The Tropicana's checks were frequently returned uncollected. This, in turn, created a cash flow

problem at P&L. Many checks issued by these entities for their withholding tax obligations, and deposited in the Summit Banks' Treasury Tax and Loan accounts (hereinafter referred to as "TT&L accounts"), were, from time to time, dishonored. Usually when a dishonored check was returned, it would be redeposited or a replacement check would be issued for deposit.

During the relevant time period, the Summit Banks—as a tax depositary pursuant to contract with the United States Department of the Treasury—were obligated, by regulation, to process tax deposits, by an "Advice of Credit," to the Treasury Department on the day the deposits were received. Pursuant to the depositary's TT&L contract, these tax deposits were credited to the Treasury on the day they were received regardless of whether the checks had cleared within the banking system. As Treasury had immediate access to these check deposits, even if such deposits did not represent good funds, Treasury had the benefit of the "float," as it is known in banking circles. In the event the check item was uncollectible, in the bank's opinion, reimbursement would be made, upon proper application, by Treasury. The determination of uncollectibility was solely within the judgment of the depositary bank, both as to status of the item and when to ask for, if at all, reimbursement.

In May, 1978, the Marquette National Bank—the clearing house for the Summit Banks—requested the Summit Banks to resolve the large amount in float, advised the banking authorities, and refused to clear any further items from the Summit Banks on the accounts, or benefit, of either the Tropicana or P&L, except by collection.

Mr. Gustafson, then in California, upon being advised, immediately returned to Minneapolis, where he conducted meetings to determine how to meet this situation. Mr. Gustafson obtained and deposited the sum of $1,500,000 at Summit Bank St. Paul for the benefit of the Tropicana. Mr. Agosto, a defendant herein, made similar financial arrangements on behalf of P&L. By their efforts, the float was resolved in a matter of days. The government charged that, upon these events, the Tropicana and P&L had obtained "improper loans" from the Summit Banks.

The central issue at trial, as related to Mr. Gustafson, was his knowledge of the "check float" and his intent to permit it to occur. Although he was aware of some financial difficulties at the Tropicana and that some checks had been returned unpaid, there was no testimony that Mr. Gustafson was informed of, or had a hand in, the continued deposit, redeposit and replacement of checks which constituted the float.

To fill this void in its case against Mr. Gustafson, the government introduced, over objection, alleged similar acts which occurred in 1975 and which were unrelated to the crimes charged in the indictment. This matter came to be known during trial as the "Marlee transaction" or the "Ethiopian check affair." Simply put, this evidence related to the deposit into a Summit Bank Richfield account of a check, written on the account of an Edwin Legg, received for the purchase of a business venture owned by the Marlee Corporation, a Gustafson-controlled company. In accordance with accepted and usual banking procedure, at the expiration of approximately four days, Summit Bank Richfield treated that deposit as collected funds in reliance upon standard clearing-house procedures.

Checks drawn against that account were paid. After receiving a stop payment order, approximately three weeks after deposit, and more than two weeks after regular banking practice permitted the use of the check as collected funds, an overdraft in the Marlee account was created. Summit Bank Richfield elected to request Mr. Gustafson to correct the overdraft, rather than back-charge the issuing bank. Mr. Gustafson complied by depositing a check issued to him, drawn on an Ethiopian bank. This check was delayed in payment because of the outbreak of civil unrest in Ethiopia. When asked by Summit Bank Richfield to replace that check, Mr. Gustafson did so with current and good funds, and the account was then closed. All of these events occurred within a few weeks of the receipt by Summit Bank Richfield of the stop payment order.

During all of the events above detailed, Mr. Bruins and Mr. Newstrum were president and vice-president, respectively, and each was a member of the Board of Directors of Summit Bank Richfield. Mr. Gustafson was Chairman of the Board.

In the course of the testimony of Mr. Newstrum, the government introduced a letter, dated December 1, 1975, addressed to the Board of Directors of Summit Bank Richfield from Joseph Vogel, then Chief Examiner for the Federal Reserve Bank of Minneapolis. Though Mr. Vogel was not called as a witness, this letter was admitted into evidence as Government's Exhibit 500 over strenuous objection by defense counsel. The letter, in part, characterized the handling of the Marlee account by Summit Bank Richfield as a "direct misapplication of bank funds" and "clearly a violation of the U. S. Criminal Code." It further stated the "[w]e have submitted

reports to the U.S. Attorney and the Federal Bureau of Investigation . . . These reports name as persons responsible . . . Chairman Gustafson, Vice President Newstrum, President Bruins, and Assistant Cashier Forsberg." The letter described the deposit of the check drawn on the Ethiopian bank as an "unsupported deposit . . . offset by a fictitious entry" on the bank record "to cover the overdrawn condition of the account Marlee, Inc."

Objections to this specific testimony and this exhibit, as well as the line of testimony, were made and overruled. Motions for mistrial were made and denied, and an invitation by the trial court for a limiting instruction was declined as ineffective against the prejudice inherent in this evidence.

This matter was emphasized and reemphasized to the jury to the extent that the trial court stated in the charge to the jury: "Well, we had a lot of evidence and all kinds of discussion about the Ethiopian affair, the Marlee-Ethiopian affair." (Tr. Vol. XVI, p. 115)

Petitioner also raises, as additional error, as more fully detailed *infra*, that he was prevented from calling a critical witness on his behalf, by an erroneous ruling of the trial court. This error was complained of on appeal, and is also one of the bases for this Petition. Mr. Gustafson sought to call, as a witness on his behalf, Mr. Bacigalupo,[3] Vice-President and Cashier of the Summit Bank St. Paul, who oversaw virtually all of the bank's

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[3]Mr. Bacigalupo—initially a co-defendant—was acquitted by the trial court at the close of the government's case, pursuant to Rule 29, Federal Rules of Criminal Procedure.

daily business. It was Bacigalupo who reviewed overdrafts and determined whether checks would be resubmitted or returned, and was thus best situated to know 1) whether Mr. Gustafson was made aware of the overdrafts on the accounts, and 2) whether he exercised any control over decisions regarding them. Without the crucial testimony of Mr. Bacigalupo then, the case was submitted to the jury. Verdicts of guilty on all counts were thereafter returned.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED IN ORDER TO RECTIFY THE DUE PROCESS VIOLATION, COMMITTED BY THE TRIAL COURT AND ERRONEOUSLY SANCTIONED ON APPEAL, BY THE IMPROPER ADMISSION OF "OTHER CRIMES" EVIDENCE

The "Marlee transaction" evidence, which the trial court permitted, over objection, to be introduced purportedly pursuant to Rule 404(b), Federal Rules of Evidence, assumed an importance at the Petitioner's trial which precluded fair consideration of the events upon which he was indicted and tried.

As this Court recognized long ago in *Michelson v. United States*, 335 U.S. 469, 475-76 (1948):

> The state may not show [in its case in chief] defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors,

> even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

"Other crimes" or "similar act" evidence, if offered for purposes other than "to prove the character of a person in order to show that he acted in conformity therewith," Rule 404(b), Federal Rules of Evidence, is admissible, assuming relevancy and no unfair prejudice. Because of the dangers this Court recognized in *Michelson*, each of the federal circuits has codified criteria which must be met before admitting "other crimes" or "similar act" evidence. *See, e.g., United States v. Foskey*, 636 F.2d 517, 523-526 (D.C.Cir. 1980); *United States v. Gonsalves*, 668 F.2d 73, 75 (1st Cir. 1982); *United States v. Manafzadeh*, 592 F.2d 81, 86 (2d Cir. 1979); *United States v. Boyd*, 595 F.2d 120, 126-127 (3rd Cir. 1978); *United States v. Billups*, 692 F.2d 320, 328-29 (4th Cir. 1982); *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc); *United States v. Largent*, 545 F.2d 1039, 1043 (6th Cir. 1976); *United States v. Wormick*, 709 F.2d 454, 458-59 (7th Cir. 1983); *United States v. Marshall*, 683 F.2d 1212, 1215 (8th Cir. 1982); *United States v. Bailleaux*, 685 F.2d 1105, 1109-10 (9th Cir. 1982); *United States v. Dysart*, 705 F.2d 1247, 1258-59

(10th Cir. 1983); *United States v. Dothard*, 666 F.2d 498, 501-02 (11th Cir. 1982).

The Eighth Circuit requires a detailed, concise analysis to determine the admissibility of such evidence. *See United States v. Fischel*, 693 F.2d 800, 803 (8th Cir. 1982) *quoting United States v. Marshall*, 683 F.2d 1212, 1215 (8th Cir. 1982):

> The rules for admission of other crimes or bad act evidence are well established: (1) the evidence of the bad act must be admissible on a material issue raised; (2) the evidence must be similar in kind and reasonably close to the charge at trial; (3) the evidence of the other crime or bad act must be clear and convincing; and (4) the probative value of the evidence must not be outweighed by its prejudice. *United States v. Frederickson*, 601 F.2d 1358, 1365 (8th Cir.), *cert. denied*, 444 U.S. 934, 100 S.Ct. 281, 62 L.Ed.2d 193 (1979).

Accord United States v. Auerbach, 682 F.2d 735, 738 n.5 (8th Cir. 1982); *United States v. Burchinal*, 657 F.2d 985, 993 (8th Cir. 1981); *United States v. Two Eagles*, 633 F.2d 93, 96 (8th Cir. 1980); *United States v. Young*, 618 F.2d 1281, 1289 (8th Cir. 1980), *cert. denied* 449 U.S. 844 (1981); *United States v. Robbins*, 613 F.2d 688, 693-94 (8th Cir. 1979); *United States v. McMillian*, 535 F.2d 1035, 1038 (8th Cir. 1976); *United States v. Bledsoe*, 531 F.2d 888, 890-91 (8th Cir. 1976); *United States v. Conley*, 523 F.2d 650, 653-54 (8th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976). Despite the clear mandate derived from the broad base of case law, this analysis was never undertaken by the trial court in regard to the

Marlee transaction and Government Exhibit 500 before admitting this evidence against the Petitioner at the trial of this case.

The trial judge, over objection, permitted the government to present evidence, unconnected to the charges, without first making the findings necessary under Rule 404(b), Federal Rules of Evidence, as interpreted in the case law. Thus, evidence highly susceptible to abusive inference by the jury—that having once sinned, the Petitioner was capable of sinning again, *United States v. James*, 555 F.2d 992, 999 (D.C.Cir. 1977)—was improperly admitted in evidence.

Despite pre-trial requests for identification of the documents through which the government intended to present the "Marlee transaction,"[4] and despite the filing of a Government Exhibit List and an Amended Exhibit List, neither court nor counsel were notified of the intended use of Exhibit 500. This surprise exhibit was a letter from Joseph Vogel, Chief Examiner for the Federal Reserve Bank of Minneapolis, to the Summit Bank Richfield characterizing its handling of the Marlee account as a "direct misapplication of bank funds" and "clearly a violation of the U.S. Criminal Code." It further advised that "[w]e have submitted reports to the U.S. Attorney and the Bureau of Investigation . . . These reports name as persons responsible . . . Chairman Gustafson, Vice-President Newstrum, President Bruins, and Assistant Cashier Forsberg."[5]

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[4]This pre-trial request was "tabled," based upon the government's representation that it would be filing an exhibit list.

[5]No prosecution was ever forthcoming as a result of the "Marlee transaction."

This damning and condemning exhibit was dropped in the laps of the defense and paraded before the jury on the morning of the 8th day of trial. Before then, the jury had heard of the Marlee transaction, over objection, in abbreviated terms by one witness, Stanley J. Gove (a former officer of Summit Richfield), as the explanation for his state of mind—"worry"—about the opening of the P&L account at the bank. Then, Roger Newstrum, former defendant testifying as a result of a plea agreement, took the stand. After some prefatory questions about the Marlee transaction—paralleling those already asked and answered by Mr. Gove—the government was permitted, over strenuous objection, to show him Exhibit 500, request him to explain its contents, and—although the writer of the letter, Joseph Vogel, was never called to testify—the letter was admitted in evidence. The jury heard Joseph Vogel as a fact witness and as an expert, giving his opinion as to acts of criminality chargeable to Mr. Gustafson, without Mr. Gustafson ever having the opportunity to confront him as a witness.

The trial court did not make the required findings, under Rules 403 and 404(b), Federal Rules of Evidence, before permitting the government to have the witness Newstrum read aloud the most dramatic portion of the letter's contents. The Exhibit's improper use at trial did not, however, end there. On cross-examination of both this Petitioner and his co-defendant, Ralph Bruins, the government was again permitted to direct the witnesses to read the letter aloud before the jury. Mistrial motions immediately following the initial admission of Exhibit 500, as well as continuing objections thereto, were summarily denied.[6]

[6]Subsequent limiting instructions, the standard exercise in futility, do not cure the error nor repair the damage.

The Eighth Circuit's opinion, from which we petition for certiorari, ignored the fundamental due process error committed by the trial judge, that it had recognized in *United States v. Pintar*, 630 F.2d 1270, 1287 (8th Cir. 1980):

> It is fundamental that unless evidence meets standards of relevant proof it is inadmissible. It is even more fundamental that if the evidence was minimally probative to the issues of the case, and if its prejudicial effect so outweighs its evidentiary value, a defendant in a criminal trial may be denied a fair trial on the charges made.

The appellate court in the instant case brushed aside the trial court's failure to apply any of the necessary criteria of admissibility before admitting the Marlee transaction and Exhibit 500. As such, the Eighth Circuit sanctioned a departure so outside the accepted and usual course of criminal proceedings that, should this Petition be granted, we shall urge that this Court ought to adopt the recent reasoning of the Second Circuit, and exercise its supervisory power to reverse Mr. Gustafson's judgment and conviction for a new trial. *See, United States v. Levy*, ____ F.2d ____, 34 Cr.L. 2386, 2387 (2d Cir., 1/31/84) (trial court committed reversible error "in admitting the evidence without considering . . . its admissibility . . . [under] Rule 404(b), without balancing the prejudicial impact of the evidence against its probative value, under Rule 403 and without giving the jury a limiting instruction . . ." even though court concludes "it would clearly have been admissible to show a common scheme or plan under Rule 404(b)

unless excludable under Rule 403. However, Levy was not given the benefit of this determination").

Rather than reviewing the effect of the trial court's omission, the Eighth Circuit in this case found, after analysis conducted for the first time on appeal, "that all of the standards for admission were met; thus, the trial court did not abuse its discretion." App. B, p. 8. This legal reasoning cannot substitute for the trial court's failure to make the required analysis of admissibility in the first instance. A failure to exercise discretion is, in itself, an abuse of the discretionary function of the court, and should not be countenanced. *Cf., Work v. United States ex rel Rives*, 267 U.S. 175, 184 (1925), and cases cited therein (mandamus, although not generally available to compel discretionary acts, is available where grant of discretionary power was never exercised in the first place). *See also United States v. Foskey*, 636 F.2d 517, 525 n.7 (D.C.Cir. 1980). Such after-the-fact findings by an appellate court so violates the basic principles of due process and the Petitioner's constitutional right to a fair trial, that it demands a remedy that only this Court, in its supervisory capacity, can now provide.

Furthermore, the Eighth Circuit's latter-day analysis of the Marlee transaction evidence and its substituted finding of admissibility on appeal is unsupported by the trial record. For example, the appellate court determined that the Marlee transaction and Exhibit 500 were made relevant at the trial of this case by a defense not yet manned when the subject evidence was admitted. *See* App. B, p. 8:

> At trial, a material issue on which evidence of other acts may be admissible was raised when the appellants' defense consisted of claiming they were innocent because they relied on their subordinates to handle these day-to-day transactions. Furthermore, government Exhibit 500 is relevant to that issue. Evidence is relevant when it serves to rebut a defense that a person had justifiably relied upon subordinates to handle business matters. *See United States v. Park*, 421 U.S. 658, 678 (1975).

This Court's opinion in *Park*, 421 U.S. at 676, which the Eighth Circuit cited, did sanction the admissibility "of evidence demonstrating that respondent was advised by FDA in 1970 of unsanitary conditions" at respondent's warehouse. This Court's opinion, however, rested upon the fact that the evidence in *Park* was introduced in rebuttal, *after* respondent had testified that he relied solely upon subordinates to run his business on a daily basis and "had no reason to suspect his subordinates were failing to insure compliance" with the Federal Food, Drug, and Cosmetic Act, a section of which he was then on trial for failure to comply. *Id.* at 677. The Eighth Circuit clearly misapplied the *Park* rationale regarding rebuttal evidence justifiably prompted by an explicit defense, to the unsupported admission of the Marlee transaction in the government's case-in-chief here. In addition, the *Park* opinion arose under an inapposite factual situation. In *Park* the underlying misdemeanor charge, 21 U.S.C. §331(k), imposed criminal liability for a variety of enumerated wrongful acts upon any responsible corporate official having the power to prevent or correct the violations. The underlying charges for which this Petitioner was tried and upon

which he has been convicted, *see, e.g.*, 18 U.S.C. §1341, 1343, require findings of knowledge and "specific intent." *See, e.g., United States v. Gelb*, 700 F.2d 875 (2d Cir. 1983), *cert. denied* ____ U.S. ____, 104 S.Ct. 167, 78 L.Ed.2d 152 (1983); *United States v. Widgery*, 636 F.2d 200, 202 (8th Cir. 1980); *United States v. Beecroft*, 608 F.2d 753, 756-57 (9th Cir. 1979). Whether Petitioner here was put on notice of an alleged prior, unconnected, bank violation, fails to show either "knowledge" or "intent"—possible permissible uses of similar act evidence under Rule 404(b)—to have participated in the "check float" scheme charged in the indictment.

Thus, if this Court grants certiorari, we intend to argue that the Eighth Circuit unjustifiably extended the reach of this Court's holding in *United States v. Park*, 421 U.S. 658 (1975), beyond its logical parameters.

Finally, the instant case presents an opportunity for this Court to announce uniform criteria for the admissibility of evidence under Rule 404(b), Federal Rules of Evidence, as well as the method by which appellate review should be governed, if trial courts depart from these criteria. For all of these reasons we pray this Petition be granted.

II.

CERTIORARI SHOULD BE GRANTED IN ORDER TO DETERMINE WHETHER THE CONSTITUTION DEMANDS THE JUDICIAL ADOPTION OF LIMITATIONS UPON THE DISCRETION OF THE TRIAL JUDGE IN REFUSING TO RULE IN ADVANCE WHETHER A CRITICAL DEFENSE WITNESS MAY BE CROSS-EXAMINED ABOUT A SECOND, SEPARATE, PENDING INDICTMENT TO IMPEACH HIS CREDIBILITY, TO WHICH QUESTIONS THE WITNESS INTENDS TO ASSERT HIS FIFTH AMENDMENT PRIVILEGE

At the close of the government's case in chief, the trial court acquitted James Bacigalupo, pursuant to Rule 29(a), Federal Rules of Criminal Procedure. As he was now available as a witness, Mr. Gustafson announced his intention to call Mr. Bacigalupo to testify for the defense. The government thereafter advised that, if Mr. Bacigalupo were so called, its cross-examination would include the subject matter of a second indictment,[7] then pending against, *inter alia*, Messrs. Bacigalupo and Gustafson, despite prior representations to the contrary.[8]

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[7]This second indictment related to the failure of the Summit Bank National Bank to file Cash Transaction Reports and the alleged falsifying of an application for $110,000 loan at the Summit State Bank of Bloomington.

[8]Prior to trial, in response to a defense motion in limine, the government had represented that it would "not allude to the September indictment or to the subject of Currency Transaction Reports in the trial."

Mr. Gustafson promptly made a mid-trial motion in limine, proffering to the trial court that the events of the second indictment would be irrelevant to his proposed direct examination of Mr. Bacigalupo, and that its probative value would be outweighed by its prejudicial effect upon the defense, especially in light of the fact that the witness would refuse to answer, by invoking his Fifth Amendment right. Legal memoranda regarding this issue were thereafter filed and oral argument heard thereon.

Based upon the inapposite holding in *United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977), the trial court refused to issue its ruling in advance, stating however:

> . . . I would think that if you called Mr. Bacigalupo and the government cross-examined him and those questions were reasonably related to what he had testified to, then I would permit them to be answered. I guess I can't give you an exact in-limine ruling unless I know what the questions are going to be. But that would be my general feeling about it.

Defense counsel moved for and was denied the opportunity to make an offer of proof and review the questions intended to be posed by the government in cross-examination. As the prejudicial impact of Mr. Bacigalupo's assertion of the Fifth Amendment, upon cross-examination, was too costly a price to pay for his testimony, he was not called as a witness.

The government had already conclusively determined the discrete nature of the episode upon which it wished to question Mr. Bacigalupo, by laying its charges in a

separate indictment. Thus the trial court erred in assuming that *United States v. Hearst, supra,* was controlling case law upon which it could rely in permitting cross-examination as the government intended.

In *Hearst,* the Ninth Circuit held that a defendant, once taking the stand in her own defense, waived her Fifth Amendment privilege to all questions relating to a "lost year" left unexplained by direct, although the years prior and subsequent had been the repeated focus of her testimony. *Id.* at 1339-1341. Mr. Bacigalupo had represented to the court that he was prepared to testify as to the case on which he had been acquitted, but would not testify as to matters related to the pending indictment. The government's questions would have sought to challenge his credibility upon a pending charge—questioning to which a witness' right to invoke his Fifth Amendment privilege is expressly reserved by Rule 608(b), Federal Rules of Evidence:

> (b) **Specific instances of conduct.**
>
> * * *
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

See also, United States v. Burch, 490 F.2d 1300, 1303 (8th Cir. 1974).

The central disputed element at trial was whether Mr. Gustafson had actual knowledge of the extent of

the check float. Mr. Bacigalupo, as the Vice-President and Cashier of Summit Bank St. Paul—the overseer of virtually all of the bank's daily business, who reviewed overdrafts and determined whether checks would be resubmitted or returned—was the individual best situated to know 1) whether Mr. Gustafson was made aware of the overdrafts on the accounts, and 2) whether he exercised any control over decisions regarding them. If Mr. Bacigalupo had been permitted to testify, he would have corroborated Mr. Gustafson's denial of knowledge or involvement; thus he was a crucial witness for the defense, for whom there was no substitute.

Had the trial court ruled on Mr. Gustafson's motion in limine and precluded the government from questions provoking the witness' assertion of the privilege, Mr. Bacigalupo would have testified. The trial court's error effectively prevented Mr. Gustafson from calling a critical witness on his behalf, and cannot be claimed as harmless error. *Cf., United States v. Burkhead*, 646 F.2d 1283, 1286 (8th Cir. 1981) (Judgment reversed upon finding that trial court abused its discretion in failing to rule in advance whether defendant could be cross-examined regarding events underlying his convictions on severed substantive counts, as it was determinative of his desire to take the stand.) *See also, United States v. Burch*, 490 F.2d 1300 (8th Cir. 1974); *cf., United States v. Pintar*, 630 F.2d 1270 (8th Cir. 1980).

Failure, in this instance, to afford Mr. Gustafson an advance ruling upon the propriety of the government's intended cross-examination of his witness was an abuse of discretion, *United States v. Burkhead*, 646 F.2d 1283 (8th Cir. 1981), and effectively deprived him of a material defense to the charges.

The Eighth Circuit, however, refused to acknowledge the critical disablement to Petitioner's Sixth Amendment right to confront witnesses wrought by the trial court's refusal to rule in advance of the witness' testimony. Instead, it disposed of this issue with the following, App. B, pp. 10-11:

> We find that Gustafson's reliance on *Burkhead* is misplaced. The court in *Burkhead* held that in the usual case the judge has discretion to refuse to rule in advance, however, this case was so outside the ordinary that a refusal to rule in advance on a matter determinative of the defendant's desire to take the stand constituted an abuse of discretion. *Id.* at 1285. Thus, *Burkhead* is the exception and the instant case is covered by the general rule. The court did not abuse its discretion.

If this Court grants certiorari, we will urge that it find that the failure of the trial court to prohibit the government in advance of the witness' testimony, from questioning him about a second, separate, pending charge which would do nothing more than elicit the witness' invocation of his Fifth Amendment privilege, violated the Petitioner's Fifth and Sixth Amendment right to defend by calling witnesses on his own behalf. *Cf.*, *Webb v. Texas*, 409 U.S. 95 (1972) (reversal of conviction mandated where trial judge *sua sponte* admonished defendant's only witness not to lie, thus discouraging witness from testifying, as this deprives criminal defendant of an opportunity to present a witness on his own behalf). *See also*, *United States v. Crawford*, 707 F.2d 447, 449 (10th Cir. 1983). ("Substantial governmental inference with defense witness's decision to testify

violates a defendant's due process rights."); *United States v. Goodwin*, 625 F.2d 693 (5th Cir. 1980) (Case reversed and remanded where trial judge's failure to make adequate inquiry about witness' assertions of Fifth Amendment privilege effectively denied defendants the right to produce witnesses in their behalf).

CONCLUSION

For all the above and foregoing reasons, Petitioner prays this Court order that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

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By ALBERT J. KRIEGER
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, to the following named addressee, this 14th day of May, 1984.

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Assistant U.S. Attorney
U.S. Attorney's Office
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Solicitor General
Department of Justice
Washington, D.C. 20530

ALBERT J. KRIEGER

ALBERT J. KRIEGER

Appendix

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APPENDIX A

[FILED MAY 4 1983]

UNITED STATES OF AMERICA

vs

UNITED STATES DISTRICT COURT FOR
DISTRICT OF MINNESOTA THIRD DIVISION

DOCKET NO. CR. 3-81-96-02

DEFENDANT: DEIL OTTO GUSTAFSON

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: May; DAY: 3; YEAR: 1983

☐ WITHOUT COUNSEL — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL — ALBERT J. KRIEGER (Name of Counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea. ☐ NOLO CONTENDERE ☐ NOT GUILTY

There being a verdict of ☐ NOT GUILTY. Defendant is discharged ☒ GUILTY.

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of mail fraud in violation of 18 USC 1341 as charged in Counts 1, 2, 3, 4, 5, 6; wire fraud in violation of 18 USC 1343 as charged in Counts 7, 8, 9, 10, 11; misapplication of bank funds in violation of 18 USC 656 as charged in Counts 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31; conspiracy in violation of 18 USC 371 as charged in Count 32 of the INDICTMENT.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) years, as to Count 1 thru 11 and 20 thru 25, said terms to be served concurrently to each other; and a committed fine of $1,000 each on Counts 1 thru 11 and a committed fine of $5,000 each on Counts 20 thru 25 for a total of $41,000.

As to Counts 26 thru 32 the defendant is committed to the custody of the attorney general or his authorized representative for imprisonment for a period of FIVE (5) years to be served concurrently to each other, but consecutively to the sentence imposed on Counts 1 thru 11 and 20 thru 25; and a committed fine of $5,000 each on Counts 26 thru 31 and a committed fine of $10,000 on Count 32 for a total of $40,000. Total sentence 10 years plus committed fine of $81,000.

SPECIAL CONDITIONS OF PROBATION

Defendant is directed to pay costs of prosecution, a liability which is made joint and several with the defendant Agosto. The U.S. Attorney is directed to file an itemization of such costs with the Clerk of Court on or before June 1, 1983 (See 28 USC 1918(b)).

Execution of sentence is stayed pending appeal.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgement be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occuring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
☒ U.S. District Judge
☐ U.S. Magistrate

/s/ EDWARD J. DEVITT
EDWARD J. DEVITT — May 4, 1983.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1631

United States of America,

Appellee,

v.

Deil Otto Gustafson,

Appellant.

Appeals from the United States District Court for the District of Minnesota

No. 83-1653

United States of America,

Appellee,

v.

Ralph Edwin Bruins,

Appellant.

Submitted: December 12, 1983

Filed: February 29, 1984

Before HEANEY, ROSS and FAGG, Circuit Judges.

ROSS, Circuit Judge.

On November 5, 1981, defendants Agosto, Gustafson, Newstrum, Bruins, Bacigalupo and Norris were named in a 31 count indictment that charged violations of 18 U.S.C. §§1005 (false entry on bank records), 1341 (mail fraud), 1343 (wire fraud), and 371 (conspiracy). Newstrum agreed, pursuant to a plea bargain, to plead to one count of mail fraud and testify on behalf of the government. A jury trial began in United States District Court for the District of Minnesota[1] on January 3, 1981. On January 14, the court granted judgments of acquittal to defendants Bacigalupo and Norris. On January 23, the jury returned its verdict: Agosto was convicted on all counts; Gustafson was convicted on all counts; and Bruins was convicted of 11 counts. On May 3, the district court imposed the following sentences: Agosto received 20 years and a $63,000 fine; Gustafson received 10 years and an $81,000 fine; and Bruins received 3 years and a $20,000 fine. Costs were imposed against Agosto and Gustafson. On August 29, 1983, defendant Agosto died of a heart attack.

On appeal, defendants Bruins and Gustafson raise the following issues: 1) whether government exhibit 500 was improperly admitted under rule 404(b); 2) whether the trial court erred in denying Bruins' motion for a new trial; and 3) whether the trial court erred in refusing to rule on Gustafson's motion in limine to restrict the

[1]The Honorable Edward J. Devitt, Senior Judge, United States District Court for the District of Minnesota.

government's cross-examination of Bacigalupo.[2] For the reasons discussed herein, we affirm.

I. General Background

Defendant Gustafson, during the relevant time period, owned 20 percent of the Tropicana Hotel and Casino. Gustafson also owned the Summit National Bank of Saint Paul, Summit State Bank of Richfield, Summit State Bank of Phalen Park, Summit State Bank of South Saint Paul, and Summit State Bank of Bloomington. Defendant Newstrum was Gustafson's "right-hand man" in the operation of the various corporations. Defendant Agosto was the owner of Production and Leasing (P&L), a Nevada corporation, which provided the Folies Bergere floor show to the Tropicana for the sum of $60,000 per week. Defendant Norris was employed by Agosto at P&L as an administrative secretary. Defendant Bruins was the president of the Summit Bank of Richfield and acted as a consultant to the Summit National Bank. Defendant Bacigalupo was the vice president and cashier at the Summit National Bank and personally handled the Tropicana and P&L accounts at that bank.

The subject of this criminal prosecution was a check floating scheme which was conducted to fraudulently assist the Tropicana and P&L's financial position by providing interest-free loans to both enterprises by the Summit Banks of Saint Paul and

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[2]Prior to oral argument, Gustafson moved to strike the affidavit of Michael Ferrence, Jr., from the record. As it appears that this affidavit was never presented to the trial court, the motion to strike is granted.

Richfield during the years of 1977 and 1978. The Tropicana obtained an improper loan from the Summit Bank of Saint Paul by using the bank as its depository bank for Tropicana employees' federal withholding taxes. P&L obtained its loans by using two Summit banks as its depository for federal withholding taxes and by opening commercial checking accounts at both banks. The Tropicana and P&L made deposits to these accounts in the form of nonsufficient fund (NSF) checks. The banks treated these as cash (collected) items and used bank funds to pay Tropicana and P&L obligations. When the checks were returned as dishonored, the banks would accept new NSF checks to replace them. This process would continue until the defendants decided to pay with "good" checks. In order to conceal this "float" scheme, officers of both banks had to make false entries on the books to avoid arousing the suspicions of bank examiners. This scheme allowed the Tropicana and P&L to continue day-to-day operations in spite of severe cash flow shortages.

During the trial, the government produced evidence that Marlee, Inc., a Nevada corporation that owned the Gamblers Hall of Fame casino, opened a checking account at Summit Richfield in July of 1975. Gustafson owned Marlee, Inc. The opening deposit was a $300,000 personal check of Ed Legg drawn on a Las Vegas bank. Prior to collection, the bank had paid $169,000 of checks written on the account. The Legg check was not collected as payment was stopped, thus, a $169,000 overdraft was created in the account. Two days later, Gustafson deposited a check drawn on an Ethiopian bank which was valued at approximately $300,000. The item was sent to a Minneapolis bank for collection. However, on the same day, Summit Richfield gave the Marlee account

a $300,000 credit which covered the overdraft. On September 16, 1975, the foreign check was still uncollected and Gustafson assured the board of directors that he would personally pay the overdraft by September 30 if the check did not clear. The overdraft was paid by Gustafson on that date.

After the bank was examined in 1975, Chief Examiner Joseph Vogel wrote a letter to the board of directors at Summit Richfield dated December 1, 1975. The letter characterized the Marlee transaction as a "direct misapplication of bank funds" with attendant "fictitious entries" on the bank's books. It named Gustafson, Newstrum, and Bruins as the persons responsible and stated that reports had been submitted to the United States attorney and the FBI. Bruins responded to the letter and indicated that he and Gustafson were concerned but felt that they handled the situation properly. No charges were filed. The Vogel letter, government exhibit 500, was introduced at trial as evidence which tended to show the defendants had knowledge and notice that suspicious "floating" activity had occurred at the bank and was deemed a misapplication of funds by the bank examiners.

The testimony of trial witnesses established that by the spring of 1978, there were so many checks and replacement checks in the clearing process that the handling of such checks became almost impossible. Agosto ordered his people to consolidate 17 Tropicana checks into two checks, payable to P&L, in the amounts of $660,000 and $360,000, respectively. These checks were deposited into the P&L account at Summit Richfield. When these checks were dishonored by the Valley Bank of Nevada, the Marquette National Bank of

Minneapolis, Summit Richfield's corespondent [sic] bank, became quite alarmed. By May 16, 1978, the Marquette Bank had refused to extend provisional credit to Summit until those deposits had been collected.

This precipitated a crisis for the Summit Banks and led to what was labeled the "Jane Lannin Affair" at trial. Bruins telephoned Gustafson to inform him of the problem created by the Marquette Bank. Gustafson summoned Newstrum and put Bruins' call on a speaker phone. Bruins suggested that the Tropicana open new accounts at other Summit Banks which did not clear through the Marquette Bank. Newstrum was ordered to call Las Vegas and have blank Tropicana checks sent to Minnesota and delivered to Bruins. Newstrum called Jane Lannin and told her to drive to the Minneapolis Airport, pick up a speed pack from the Tropicana, deliver it to Bruins and await further instructions. When Lannin arrived at the bank, Bruins instructed her to open new accounts at two other Summit Banks in the name of Hotel Conquistador, Inc. When Lannin opened the new accounts, she drew checks payable to Summit National as directed by Bruins. The plan never achieved its desired effect because the bank examiners entered the bank before the checks could be presented for collection. Newstrum testified that Gustafson told him to lie to the FBI about the "Jane Lannin Affair" and to shift the responsibility from Minnesota to the people in Las Vegas.

On Monday, May 22, 1978, the federal bank examiners entered Summit National and Summit Richfield and discovered that $2,400,000 worth of checks were in float. Since this exceeded the capital of the bank, there was concern that the bank would fail. Gustafson borrowed

$1,500,000 from a local bank to pay off floating checks. Agosto, through wire transfers, was able to pay off all but $220,000 at Summit National and $141,000 at Summit Richfield.

It appears that after the above payments were made, Gustafson and Bacigalupo set about to try to cover the remaining deficiency. On June 21, 1978, two miscellaneous credit slips to the P&L account were filed showing cash deposits of $110,000 and $109,000, respectively. These slips bore the initials of Bacigalupo as the responsible bank official. No currency transaction reports were filed. Furthermore, suspicious loans had been made earlier in the same day. These transactions are the subject of a second indictment in which Bacigalupo and Gustafson were charged with failure to file currency reports and for false entries on bank books. That case had not been tried prior to the trial of the instant case.

II. Evidence of Other Crimes, Wrongs or Acts

Government exhibit 500, the letter of Chief Bank Examiner Vogel, was admitted into evidence and went to the jury. Appellants assert that the admission of such evidence was an abuse of Rule 404(b) of the Federal Rules of Evidence.[3] Appellants contend that the

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[3]Rule 404(b) reads as follows:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

government introduced this evidence to show that they had a propensity towards criminal behavior. Under Rule 404(b), such evidence is not admissible to prove the bad character of the defendant, but may be admissible for other purposes, such as proof of motive, knowledge, or intent. *United States v. Goehring*, 585 F.2d 371, 372 (8th Cir. 1978).

The standards in this circuit for the admission of other wrongs or acts evidence for such purposes are well established:

> Our cases reveal certain requirements which must be met for other crimes evidence to be admissible under the rule: (1) a material issue on which other crimes evidence may be admissible has been raised, *e.g.*, *United States v. Drury*, 582 F.2d 1181, 1184 (8th Cir. 1978); *United States v. Maestas*, 554 F.2d 834, 837 (8th Cir.), *cert. denied*, 431 U.S. 972, 97 S.Ct. 2936, 53 L.Ed.2d 1070 (1977); (2) the proffered evidence is relevant to that issue, *ibid.*; (3) the evidence of the other crimes is clear and convincing, *e.g.*, *United States v. Cobb*, 588 F.2d 607, 612 (8th Cir. 1978), *cert. denied*, [440 U.S. 947], 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979); *United States v. Drury*, *supra*, 582 F.2d at 1184; *United States v. Davis*, 551 F.2d 233, 234 (8th Cir.), *cert. denied*, 431 U.S. 923, 97 S.Ct. 2197, 53 L.Ed.2d 237 (1977). In addition, to be admissible on such issues as intent, knowledge, or plan, the other crimes evidence must relate to wrongdoing "similar in kind and reasonably close in time to the charge at trial." *United States v. Drury*, *supra*, 582 F.2d at 1184. *See*,

> *e.g., United States v. Little*, 562 F.2d 578, 581 (8th Cir. 1977); *United States v. Jardan*, 552 F.2d 216, 219 (8th Cir.), *cert. denied*, 433 U.S. 912, 97 S.Ct. 2982, 53 L.Ed.2d 1097 (1977). Finally, evidence otherwise admissible under Rule 404(b) may be excluded under Fed. R. Evid. 403, "if its probative value is substantially outweighed by the danger of unfair prejudice * * *."

United States v. Burchinal, 657 F.2d 985, 993 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981) *quoting United States v. Frederickson*, 601 F.2d 1358, 1365 (8th Cir.) *cert. denied*, 444 U.S. 934 (1979).

Rule 404(b) is one of inclusion because it allows the admission of evidence of other crimes, wrongs or acts relevant to an issue in the trial, unless it tends only to prove criminal disposition. *United States v. Wagoner*, 713 F.2d 1371, 1375 (8th Cir. 1983). The trial court is vested with broad discretion in deciding whether to admit wrongful act evidence. *United States v. Evans*, 697 F.2d 240, 248 (8th Cir.), *cert. denied*, 103 S.Ct. 1779 (1983). The decision to admit such evidence will only be reversed when it is clear that the questioned evidence has no bearing upon any of the issues involved at trial. *United States v. Marshall*, 683 F.2d 1212, 1215 (8th Cir. 1982).

In the present case, we find that all of the standards for admission were met; thus, the trial court did not abuse its discretion. At trial, a material issue on which evidence of other acts may be admissible was raised when the appellants' defense consisted of claiming they were innocent because they relied on their subordinates to handle these day-to-day transactions. Furthermore,

government exhibit 500 is relevant to that issue. Evidence is relevant when it serves to rebut a defense that a person had justifiably relied upon subordinates to handle business matters. *See United States v. Park*, 421 U.S. 658, 678 (1975).

We also find that the evidence of other acts was clear and convincing. To meet the clear and convincing standard, the proffered evidence cannot be admitted if it is of vague and uncertain character. *United States v. Clemons*, 503 F.2d 486, 490 (8th Cir. 1974). Furthermore, the prior conduct cannot be equally consistent with an innocent explanation. *Id.* The uncontradicted evidence showed that the Ethiopian check was treated as a cash item and credited to Gustafson's account on the same day it was sent to Minneapolis for collection. Additional checks were then written on the account after it was given credit and prior to collection. We find it clear that an improper "float" occurred due to the bank giving credit to Gustafson's account. Under this same analysis, we find that the evidence related to wrongdoing similar in kind and reasonably close in time to the charge at trial.

Finally, we find that the evidence was properly admitted because its probative value was substantially outweighed by the danger of unfair prejudice. This court would find it quite difficult to rule that the admission of government exhibit 500 caused the appellants to be convicted on an improper basis. Moreover, the trial court gave a limiting instruction telling the jury not to consider such evidence as substantive proof but only as proof of notice or knowledge of a prior incident. Such an instruction diminishes the danger of any unfair prejudice arising from the admission of evidence of

other acts. *United States v. Goehring, supra*, 585 F.2d at 373.

III. Bruins' Motion for a New Trial

Bruins asserts that because Gustafson and Agosto agreed, after trial, to give information to the government in exchange for a more lenient sentence, newly discovered evidence now exists that would justify granting him a new trial. Bruins submits that now Gustafson and Agosto would not try to implicate him in their crime and their testimony would be much more credible as they are now "on the government's side." Bruins argues that since this was unavailable during the first trial, it constitutes newly discovered evidence.

This court has set forth the criteria for granting a motion for a new trial on the ground of newly discovered evidence on numerous occasions. Before such a motion can be granted, the following five criteria must be met:

> (1) the evidence must be in fact newly discovered, that is, discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) it must be of such nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Swarek, 677 F.2d 41, 43 (8th Cir.), *cert. denied*, 103 S.Ct. 723 (1983). It is also well settled that such motions are looked upon with disfavor and we will

not overturn the trial court's decision absent a clear abuse of discretion. *United States v. Pope*, 415 F.2d 685 (8th Cir.), *cert. denied*, 397 U.S. 950 (1970).

We find that the showing made in support of the motion for new trial does not satisfy the criteria set out in *Swarek*. The court did not abuse its discretion in denying the motion.

IV. Gustafson's Motion in Limine

At the close of the government's case, the court granted a judgment of acquittal to Bacigalupo. As he was available as a witness, Gustafson announced his intention to call Bacigalupo to testify for the defense. The government advised that, if Bacigalupo was called, its cross-examination would include the subject matter of the second indictment pending against Bacigalupo and Gustafson. Gustafson made a motion in limine requesting that the government not be allowed to broach the second indictment in cross-examination. The trial court refused to rule in advance on the motion and Gustafson chose not to call Bacigalupo to the stand.

Gustafson asserts that this court's decision in *United States v. Burkhead*, 646 F.2d 1283 (8th Cir.), *cert. denied*, 454 U.S. 989 (1981), compels a finding of reversible error. We disagree. In *Burkhead*, the court found reversible error when a trial court failed to rule in advance on whether a defendant could be cross-examined regarding events underlying his conviction on severed substantive counts as it was determinative of his desire to take the stand. We find that Gustafson's reliance on *Burkhead* is misplaced. The court in *Burkhead* held that in the usual case the judge has discretion to refuse

to rule in advance, however, this case was so outside the ordinary that a refusal to rule in advance on a matter determinative of the defendant's desire to take the stand constituted an abuse of discretion. *Id.* at 1285. Thus, *Burkhead* is the exception and the instant case is covered by the general rule. The court did not abuse its discretion.

V. Conclusion

For the foregoing reasons, the convictions are affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

83-1631/1653.

September Term, 1983

UNITED STATES OF AMERICA,

Appellee,

vs.

DEIL OTTO GUSTAFSON,
RALPH EDWIN BRUINS

Appellants.

Appeals from the United States District Court for the District of Minnesota

Petitions of appellants for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and they are hereby, denied.

March 30, 1984

FILED
OCT 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1931

In the Supreme Court of the United States

OCTOBER TERM, 1984

DEIL OTTO GUSTAFSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in admitting evidence of prior similar conduct to establish petitioner's knowledge and intent pursuant to Rule 404(b) of the Federal Rules of Evidence.

2. Whether the district court improperly declined to rule in advance on petitioner's motion in limine respecting the scope of cross-examination of a potential defense witness.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B13) is reported at 728 F.2d 1078.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 1984. A petition for rehearing was denied on March 30, 1984 (Pet. App. C1). The petition for a writ of certiorari was filed on May 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on 24 counts charging conspiracy, misapplication of bank funds, mail fraud and wire fraud, in violation of 18 U.S.C. 371, 656, 1341 and 1343, and sentenced to a total of ten

years' imprisonment and a fine of $81,000. The court of appeals affirmed (Pet. App. B1-B13).

The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner and his co-conspirators engaged in an elaborate check-floating scheme during 1977 and 1978 in order to obtain the use of funds from several banks owned or controlled by petitioner. The funds were used to improve the cash-flow situation of a Las Vegas hotel in which petitioner had an interest and an entertainment firm owned by a co-conspirator, enabling those businesses to meet their payrolls and to avoid being closed by the Internal Revenue Service. Pet. App. B3-B4.

The businesses maintained checking accounts and depository accounts for federal withholding taxes at petitioner's banks. They regularly deposited into these accounts checks that were not backed by sufficient funds. Petitioner's banks treated these checks as collected items and permitted the corporations to draw upon them to meet their obligations. When the checks were returned as dishonored, petitioner's banks would accept new checks, again not backed by sufficient funds, to replace them. These too were treated as collected items, starting the cycle anew. The corporations thus relied on the "float" period between the time the checks were deposited and the time they were dishonored to obtain the use of the money without paying interest. Bank officials made false entries on the books of the banks in order to conceal the scheme from bank examiners. Pet. App. B3-B4. The total amount of money involved was substantial, with over $4.3 million in float at one time (4 Tr. 106-107; Gov't Exh. 389).

Petitioner was closely involved in this scheme. He opened certain of the accounts and was aware of the number, frequency and total dollar amount of the bounced checks (2 Tr. 36; 3 Tr. 14; 6 Tr. 18, 183; 7 Tr. 87, 96-99, 102-105,

190-192, 198, 202-207; 9 Tr. 78-79, 113-114). When his banks' correspondent bank refused to extend further credit because of the magnitude of the float, petitioner was involved in an attempt to shift the scheme to a different bank and instructed a co-conspirator to lie to the Federal Bureau of Investigation about the matter (Pet. App. B6). On the same day that federal bank examiners entered two of petitioner's banks to audit the float, he persuaded two businessmen to borrow $1.5 million from a Minnesota bank for him, and he used this money to pay off all but $361,000 of the outstanding float (*id.* at B6-B7).

ARGUMENT

1. Petitioner first contends (Pet. 12-20) that the district court abused its discretion in permitting the introduction of evidence of other crimes, pursuant to Rule 404(b) of the Federal Rules of Evidence, to establish his knowledge and intent. The court of appeals correctly determined (Pet. App. B7-B11) that admission of the evidence was proper. Review of petitioner's fact-bound claim is unwarranted.

The evidence at issue related to petitioner's involvement in a 1975 check-floating scheme concerning Marlee, Inc., another corporation owned by petitioner. Marlee opened a checking account at one of petitioner's banks by depositing a personal check for $300,000 written by Ed Legg. The bank treated the check as collected, and permitted Marlee to withdraw $169,000 on the funds before Legg stopped payment on the check. To cover the overdraft, petitioner deposited a check for $300,000 drawn on an Ethiopian bank into Marlee's account. This check was also treated as collected, and Marlee withdrew an additional $65,000 on these funds. Two months later, the Ethiopian check was still uncollected. Petitioner assured the bank's board of directors that he would cover any overdraft and subsequently did so. After petitioner's bank was examined in December 1975, Chief Federal Reserve Bank Examiner Fogel wrote a letter

(Gov't Exh. 500) to the board of directors characterizing the transaction as a "direct misapplication of bank funds" with attendant "fictitious entries" on the bank's books. The letter named petitioner as one of the parties responsible for the transaction. Pet. App. B4-B5.

a. Petitioner claims that the letter was not admissible under Rule 404(b) because it was not relevant (Pet. 18-20) and because the district court did not make explicit findings on the record concerning its admissibility (Pet. 15-18). The evidence was clearly relevant to petitioner's intent and knowledge. The Marlee scheme demonstrated that petitioner well knew how to manipulate the float in order to kite checks, and the letter cast serious doubt on his defense that he did not know of or intend the float-manipulation activities charged in the indictment. See, *e.g.*, *United States* v. *Foley*, 683 F.2d 273, 278-279 (8th Cir.), cert. denied, 459 U.S. 1043 (1982). Under the balancing approach adopted by the Eighth Circuit, which petitioner does not contend is in conflict with that followed by the other courts of appeals (see Pet. 13-14), the district court acted well within its discretion by admitting the evidence for the limited purpose of establishing petitioner's knowledge and intent (Pet. App. B9-B10).

Petitioner argues (Pet. 18) that the evidence was not relevant because it was admitted during the government's direct case, before his defense was fully before the court. But petitioner put his intent in issue by his plea of not guilty. *E.g.*, *United States* v. *Russo*, 717 F.2d 545, 552 (11th Cir. 1983); *United States* v. *Wagoner*, 713 F.2d 1371, 1375 (8th Cir. 1983); *United States* v. *Roberts*, 619 F.2d 379, 383 (5th Cir. 1980). Moreover, in his opening statement petitioner set forth his defense that he exercised legitimate business judgment and did not carefully supervise his banking operations (1.1 Tr. 6, 11). Finally, even during the government's direct case it was clear that petitioner's defense focused on

his ignorance of any deliberate float-manipulation activities and his reliance on subordinates who were alleged to be responsible for the transactions without his knowledge (*e.g.*, 8 Tr. 134-139, 155, 157-158; 9 Tr. 104-107). Given these signals, it was perfectly reasonable for the court to anticipate petitioner's defense and admit the exhibit when it was offered. See, *e.g.*, *United States* v. *Hooten*, 662 F.2d 628, 635 (9th Cir. 1981), cert. denied, 455 U.S. 1004 (1982); *United States* v. *Burchinal*, 657 F.2d 985, 993 (8th Cir. 1981). In any event, petitioner's defense was in fact consistent with what was expected at the time the evidence was admitted (see Pet. 9).

b. Petitioner's contention (Pet. 15-18) that the district court failed to exercise its discretion is without merit. Although the court did not explicitly set forth the basis for its ruling, it was made well aware by counsel of the factors to be considered under Rules 404(b) and 403. The court's own repetition of these factors was surely not required. Moreover, the court's invitation to counsel to supply a limiting instruction and the careful limiting instructions that were in fact given (8 Tr. 97-98; 14 Tr. 153; 16 Tr. 115-116) demonstrated that the court had resolved the competing concerns relevant under the Rules. Especially where, as the court of appeals concluded (Pet. App. B10), the probative value of the evidence "substantially outweighed" the danger of unfair prejudice, nothing would now be gained by requiring the district court to make its finding explicit.[1]

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[1]Petitioner's reliance (Pet. 17) on *United States* v. *Levy*, 731 F.2d 997, 1002-1004 (2d Cir. 1984), is misplaced. In that case, the district court had determined that the proffered evidence was part of the same transaction charged in the indictment, not a separate crime admissible only under Rule 404(b). Accordingly, the court admitted the evidence without limitation of the purpose for which it could be considered and without determining whether it was admissible under Rule 404(b) and Rule 403. The court of appeals concluded that the evidence was within

2. Petitioner also contends (Pet. 21-26) that he was improperly denied an advance ruling on his motion in limine to limit cross-examination of a prospective defense witness. The court of appeals properly rejected this claim (Pet. App. B12-B13).

a. Apart from the charges in the instant case, petitioner was charged with co-defendant Louis Bacigalupo in a second indictment with conspiracy and failure to file currency transaction reports in connection with the payment of a lingering overdraft of $220,000 resulting from the check-kiting scheme. At the close of the government's case, the court acquitted Bacigalupo. In the present case, petitioner announced his intention to call Bacigalupo as a defense witness. The government informed the court that it would seek to cross-examine the witness about the pending charges in the second indictment. Bacigalupo's attorneys stated that he would assert his privilege against self-incrimination in response to such questions. Pet. App. B12.

Petitioner sought an advance ruling from the court restricting the proposed cross-examination on the ground that it would not be relevant or within the scope of what he intended to cover on direct examination of Bacigalupo (12

Rule 404(b) and found prejudicial error in the district court's failure to determine its admissibility on that basis, especially in light of the slender evidence of the defendant's guilt. Here, unlike in *Levy*, the district court did admit the evidence under Rule 404(b), a limiting instruction was given, and the substantive evidence of guilt was substantial.

Petitioner also suggests (Pet. 15-16) that the government withheld the bank examiner's letter before trial and that he was unfairly surprised at trial. In our brief to the court of appeals (at 41-42) and in an affidavit, we explained that the exhibit was available to petitioner for two years before trial and that the prosecutor had given notice over a year before trial of his intent to introduce evidence relating to the Marlee transaction. Moreover, petitioner did not object on the ground of surprise when the evidence was offered or otherwise contend before the district court that the document had been withheld.

Tr. 87). The court responded that it would allow cross-examination that was "reasonably related" to the direct testimony, but declined to rule definitively until it knew precisely what would be covered on direct (12 Tr. 86; see Pet. 22; Pet. App. B12). After it became clear during petitioner's own testimony that the overdraft would be relevant, petitioner rested without calling Bacigalupo. Petitioner's counsel explained that "it became even more obvious to me that such examination [into the facts surrounding the second indictment] would probably be permitted by the court" (14 Tr. 201).

b. As the court of appeals concluded (Pet. App. B12-B13), there was no error in the district court's refusal to rule more definitively on the motion in advance of the witness's testimony on direct. There is no requirement that a court rule on an in limine motion such as petitioner's.[2] See *New Jersey* v. *Portash*, 440 U.S. 450, 462 n.1 (Powell, J., concurring); *United States* v. *Luce*, 713 F.2d 1236, 1239-1240 (6th Cir. 1983) (citing cases), cert. granted, No. 83-912 (argued Oct. 3, 1984);[3] *United States* v. *York*, 722 F.2d 715 (11th Cir. 1984) (per curiam); *United States* v. *Rivers*, 693 F.2d 52, 53-54 (8th Cir. 1982); *United States* v. *Cook*, 608 F.2d 1175, 1186 (9th Cir. 1979) (en banc), cert. denied, 444 U.S. 1034 (1980); *Cook*, 608 F.2d at 1188 (Wallace, J.,

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[2]This Court denied certiorari last Term in a case raising substantially the same issue. *Bagbey* v. *United States*, No. 83-1012 (Mar. 26, 1984).

[3]There is no need to hold this petition pending the decision in *Luce*. The issue here is whether a district court is required to rule on an in limine motion. The question before the Court in *Luce* is whether, where the district court does rule on such a motion, that ruling is reviewable on appeal. Even if the Court were to decide that advance rulings are reviewable, it would by no means follow that the district courts lack discretion to decline to make those rulings. This Court denied certiorari in *Bagbey* (see note 2, *supra*) on the same day that it granted the petition in *Luce*.

concurring); *id.* at 1190 (Kennedy, J., concurring in part and dissenting in part); *United States* v. *Hickey*, 596 F.2d 1082 (1st Cir. 1979). Especially where, as here, the propriety of the proposed cross-examination depended critically on the nature of the direct examination,[4] it was not unreasonable for the district court to decline to rule definitively before actually hearing the witness's testimony on direct.

The only case of which we are aware holding that the failure to rule on an in limine motion was reversible error, *United States* v. *Burkhead*, 646 F.2d 1283 (8th Cir.), cert. denied, 454 U.S. 898 (1981), is inapposite, as the court below recognized (Pet. App. B12-B13). In *Burkhead*, the defendant sought a ruling precluding his impeachment by prior convictions on substantive counts charged in the same indictment as the conspiracy count on which he was then being tried. The court of appeals noted (646 F.2d at 1286) that "the district court generally has discretion to defer ruling on evidentiary issues until the evidence is actually offered for admission," but it concluded (*ibid.*) that "[u]nder the special circumstances of this case" the refusal to rule in advance was an abuse of discretion because the prior convictions were so clearly inadmissible and the refusal to rule so obviously prejudicial. The court below correctly distinguished its decision in *Burkhead* as an exception and noted (Pet. App. B13) that "the instant case is covered by the general rule" permitting district courts to

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[4]See Fed. R. Evid. 611(b). Contrary to petitioner's contention before this Court (Pet. 22-23), but as he recognized in the district court (see pages 6-7, *supra*), the cross-examination would have been substantively relevant, not limited to impeaching the witness's credibility. Moreover, the proposed cross-examination could not have been limited merely because the witness intended to assert his Fifth Amendment privilege. See *McGautha* v. *California*, 402 U.S. 183, 215 (1971); *United States* v. *Hearst*, 563 F.2d 1331, 1338-1341 (9th Cir.), cert. denied, 435 U.S. 1000 (1978).

decline to rule on advance motions. In any event, even if there were a conflict, it would be one for the Eighth Circuit, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1984

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